A

SAKYO CORPORATION & ANOR

v.

DOW JONES & COMPANY INC & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN YUNUS J
[CIVIL SUIT NO: S3-23-33-2003]
24 MAY 2005

C ***CIVIL PROCEDURE:*** *Service - Out of jurisdiction - Setting aside - Grounds of application - Whether sufficient - Conditional appearance - Whether valid - Application for leave - Whether proper - Course of action taken under O. 12 r. 6 RHC 1980 - Whether appropriate - Rules of the High Court 1980, O. 12 rr. 6, 7, O. 18 r. 19(1)(a), O. 32 r. 1*

D

The plaintiffs commenced an action against the defendants for defamation in respect of an article published in an issue of the Asian Wall Street Journal. The plaintiffs obtained an *ex parte* order to serve a notice of writ of summons out of jurisdiction on the defendants. Upon service of the writ thereof, the defendants made E an *ex parte* summons in chambers for leave to enter conditional appearance to set aside the notice of the writ of summons and the service thereof *vide* encl. 13. The senior assistant registrar granted encl. 13. Subsequently the defendants applied *vide* encl. 18 to set aside the plaintiffs' *ex parte* order granting the plaintiffs F leave to issue and serve a notice of writ of summons out of jurisdiction on the defendants and to set aside the service of the notice thereof. The SAR, however, dismissed encl. 18. Hence, the defendants' appeal.

G **Held (dismissing the appeal):**

(1) There was non-compliance of O. 32 r. 1 and Form 62 of the Rules of the High Court 1980 ('RHC'). The affidavit in support of encl. 13 merely repeated the single ground already H mentioned therein, namely, that the plaintiffs' statement of claim failed to disclose a cause of action. Considering the nature and content of the statement of claim, the defendants in their application *vide* encl. 13 or in the affidavit in support must explain in what way it could be said that the statement I of claim did not disclose any cause of action. It followed that encl. 13 was fundamentally flawed and therefore the SAR should not have granted it in the first place. (paras 15, 17 & 18)

(2) There was material non-disclosure on the part of the defendants *vide* encl. 13. When a party makes an application to court, a full and frank disclosure is mandatory – all the more so in an *ex parte* application where the application is made in the absence of the opposing party or the party that will be directly affected by the *ex parte* sought for (in the event it is granted). (para 19)

(3) Where a defendant takes the position that the plaintiff's statement of claim discloses no reasonable cause of action, the appropriate course of action to be taken is to challenge or impugn the statement of claim and not the writ, notice or service of the writ. He can only do so by first filing an unconditional appearance and thereafter to make an application by summons in chambers under O. 18 r. 19(1)(a) RHC for the statement of claim to be struck out. The defendants herein should not have made an application for leave to file a conditional appearance since they were merely questioning the plaintiffs' statement of claim. Enclosure 13 was therefore misconceived. (para 24)

(4) Since encl. 13 was misconceived, the conditional appearance entered by the defendants could not be recognised as a valid conditional appearance. At best, the appearance could be regarded as an unconditional appearance. It followed that encl. 18 must fail since the defendants should have entered a valid conditional appearance and not an unconditional appearance to discharge the plaintiffs' *ex parte* order to serve the notice of the writ out of jurisdiction and to set aside the notice thereof. (paras 29 & 30)

(5) There was no mention in the defendants' application *vide* encl. 13 to apply to discharge the plaintiffs' *ex parte* order. The defendants having obtained leave to file a conditional appearance to set aside the notice of the writ and to set aside the service thereof could not now armed with conditional appearance apply also to set aside the plaintiffs' *ex parte* order. The defendants in their application *vide* encl. 18 must only confine themselves to the two purposes mentioned in their application for leave *vide* encl. 13. (para 32)

(6) The defendants, having obtained leave to enter a conditional appearance on the single ground that the plaintiffs' failed to disclose a cause of action in their application *vide* encl. 13, could not now add two more grounds, namely, on jurisdiction and on irregular service in their application *vide* encl. 18. To add further grounds in their application *vide* encl. 18 would be improper and an abuse of the process of the court. In any case, on a careful examination of the statement of claim, the plaintiffs did not fail to disclose a cause of action. (paras 34 & 35)

Case(s) referred to:

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [2000] 2 CLJ 473 CA ***(not foll)***

Balakerisnan Varathan & Anor v. Muniandy Varathan & Anor [2005] 3 CLJ 327 HC ***(refd)***

Dormeuil Freres SA & Anor v. Nicolian International (textiles) Ltd [1988] 3 All ER ***(refd)***

N Caruppaiya v. MBf Property Services Sdn Bhd & Anor [2000] 4 CLJ 116 HC ***(refd)***

Tan Sri Shamsuddin Abdul Kadir & Anor v. Dow Jones & Company Inc & Ors [2006] 2 CLJ 998 HC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 11 r. 1(h), O. 12 rr. 6, 7, O. 18 r. 19(1)(a), O. 32 r. 1

For the plaintiffs - John Skelchy; M/s Zaid Ibrahim & Co
For the defendants - Jeffrey John; M/s Shafee & Co

Reported by Usha Thiagarajah

JUDGMENT

Hishamudin Yunus J:

[1] Enclosure 27 is an appeal by the 1st, 2nd and 4th defendants (hereinafter shall be referred to collectively as the 'defendants') to the judge in chambers against the decision of the learned senior assistant registrar given on 20 February 2004 dismissing with costs their application (*vide* encl. 18):

(a) to set aside an *ex parte* order dated 2 June 2003 (encl. 13, granted under O. 11 r. 1(h) of the Rules of the High Court, 1980, hereinafter shall be referred to as the 'plaintiffs' *ex parte*

order') granting leave to the plaintiffs to issue and serve a notice of writ of summons out of jurisdiction on the defendants; and

(b) to set aside the service of the notice of the writ of summons on the defendants pursuant to the aforesaid plaintiffs' *ex parte* order.

[2] This appeal does not concern the 3rd defendant. I have dismissed this appeal with costs, and now I shall give my grounds.

[3] The 1st plaintiff is a company incorporated in Japan. The 2nd plaintiff is a substantial shareholder of the 1st plaintiff and is also its managing director.

[4] The 1st defendant company is the owner of the newspaper known as the Asian Wall Street Journal and has its head office in New York. The 2nd defendant company is the publisher of the Asian Wall Street Journal and has its business address in Hong Kong. The 2nd defendant is the Asian subsidiary of the 1st defendant. The 4th defendant is the editor of the Asian Wall Street Journal who resides in Hong Kong.

[5] The Asian Wall Street Journal newspaper has a wide circulation in Malaysia.

[6] In the present action, the plaintiffs' action against the defendants is for the tort of defamation in respect of an article appearing in one of the issues of the Asian Wall Street Journal. The article is entitled 'Perwaja Probe Focuses on a Payment'.

[7] The plaintiffs' statement of claim reads as follows:

Statement Of Claim

1. The 1st Plaintiff is a company incorporated in Japan.

2. The 2nd Plaintiff is a substantial shareholder of the 1st Plaintiff and its Managing Director.

3. The 1st Defendant was and is the proprietor of a newspaper known as The Asian Wall Street Journal and/or was and is the owner of the copy right and/or the trade mark of The Asian Wall Street Journal. Alternatively, the 1st Defendant, as proprietor of The Asian Wall Street Journal gave its authority to and/or consent for the publication of The Asian

Wall Street Journal. It has its corporate headquarters at 200, Liberty Street, New York 10281. The Asian Wall Street Journal enjoys a wide circulation in Malaysia.

4. The 2nd Defendant was and is the publisher of The Asian Wall Street Journal and having its business address at 25/F, Central Plaza, 18, Harbour Road, G.P.O. Box 9825, Hong Kong. It is the Asian subsidiary of the parent company in New York, i.e. the 1st Defendant.

5. The 3rd Defendant is the author of the article entitled "Perwaja Probe Focuses on a Payment' ("the Article") which was published in the 15.5.02 issue of The Asian Wall Street Journal. The 3rd Defendant is resident in Malaysia with an address at Suite 11 -01, Menara Dion, 27, Jalan Sultan Ismail, 50250 Kuala Lumpur.

6. The 4th Defendant was and is the editor of The Asian Wall Street Journal with an address for service at 25/F, Central Plaza, 18, Harbour Road, G.P.O. Box 9825, Hong Kong.

7. In the 15.5.02 issue of The Asian Wall Street Journal, the 3rd Defendant wrote and the 1st , 2nd and 4th Defendants published the Article which is defamatory of the Plaintiffs. The Plaintiffs rely on the Article as a whole, its headline cited above, the sub-title that reads "New Clues About $30.6 Million Transfer Could Cause Problems in Malaysia" and the following passages from it (collectively referred to as "the Words"):

   a. "New clues about a mysterious payment at the center of one of Southeast Asia's biggest financial scandals could stir trouble in Malaysia."

   b. "Malaysian authorities investigating the near-collapse of state-owned steel-maker Perwaja Terengganu have zeroed in on a payment of about $30.6 million made by the company in relation to the construction of a new plant. The payment was first disclosed in a 1995 internal Perwaja report where it was alleged to be illegal. The investigators, Malaysia's Anti-Corruption Agency, won't comment on the probe, which they say is still under way."

   c. "But according to interviews and documents seen by the Asian Wall Street Journal, the payment benefited Sakyo Corp., a Japanese concern owned by Yasuomi Osada a former adviser to Perwaja who acted as a middleman for a consortium of Japanese companies that had a contract

to build a specialized-steelmaking plant for the state-owned concern. The other shareholder in Sakyo is Shahril Shamsuddin, the son of well-known Malaysian businessman Shamsuddin Abdul Kadir."

d. "The disclosure of where this particular Perwaja payment went could become a political hot potato for Prime Minister Mahathir Mohamad, who has been in power for 21 years and on whose watch a number of business scandals involving taxpayer funds have occurred and are unresolved."

e. "People familiar with the matter say the investigators targeted the $30.6 million payment largely because of Perwaja's 1995 internal report, which alleged that one of the steel company's main operating units, Perwaja Rolling Mill & Development Sdn. Bhd., misused proceeds of a $196 million loan from a Japanese consortium led by Itocho Corp. that included Nissho Iwai Corp. and Tomen Corp."

f. "The loan followed the granting in 1993 by Perwaja Rolling Mill of a contract valued at 76 billion yen (US$805 million at the time) to the Itochu-led consortium to build the specialized steel plant. The proceeds were to be used to buy spare parts and technical services for the new plant that were provided by NKK Corp. Instead, the report said, the loan was 'fully utilized for other purposes,' including the $30.6 million payment in early 1994 made to the Hong Kong bank account of Frilsham Enterprises Inc., a British-Virgin Islands registered company."

g. "In mid-February 1994, Perwaja Rolling Mill received a letter on NKK stationery purported signed by N Otani, a director at NKK's engineering division, asking for the payment in compliance with the technical services agreement concluded Nov. 4 1993. The NKK letter stated that it wanted payment to be made to Frilsham, which was described as an 'associated company' of NKK."

h. "Within a week, the money was transferred to a just-opened Frilsham account at the American Express Bank Ltd. in Hong Kong."

i. "People familiar with the Perwaja probe say that by late 1996 the investigators had established that Mr. Osada and a close associate, Yuji Maeda, a freelance business consultant, were associated with Frilsham. According to those people, the investigators traveled to Tokyo to interview Mr. Osada, a businessman who has extensive ties to Malaysia and who has been a longtime friend of Tan Sri Chia. Anti-corruption officials declined to comment on their meeting with Mr. Osada."

j. "Documents seen by this newspaper show that the Perwaja payment to Frilsham's Hong Kong bank account was immediately transferred into other accounts. A payment of 2.48 billion yen went to the account of another private concern called Borneo Enterprises Inc.; a second transfer of 143.7 million by Frilsham went to Mr. Osada's business associate Mr. Maeda. The remainder - roughly 260 million yen - went to a Malaysian concern as a portfolio management fee."

k. "Mr. Maeda, who in the 1980's was employed in Malaysia and Japan by Tan Sri Shamsuddin's Sapura group, which has interests in cable manufacturing and telecommunications, couldn't be contacted."

I. "According to the previously unpublicized statutory declaration by Mr. Osada recorded in May 1999 in Kuala Lumpur and seen by The Asian Wall Street Journal, the $30.6 million payment represented fees due to Sakyo, a company he controlled, by the Itochu-led consortium. Mr. Osada swore that the payment to Frilsham was part of a private arrangement he had struck with Itochu and NKK, and was kept away from the knowledge of Perwaja. Mr. Osada stated that the Sakyo was engaged by Itochu to help the Japanese consortium secure a contract to build Perwaja Rolling Mill's specialized steelmaking plant, and that Sakyo was to be paid up to 4.89 billion yen, including the $30.9 million payment, if the consortium won the contract. The arrangement was documented in an agreement signed by Mr. Osada and Ryuzo Ogino, the general manager of Itochu's metal and infrastructure department at the time. A copy of that agreement was attached to Mr. Osada's statutory declaration."

m. "In three separate interviews recently with this newspaper - two in Tokyo and another in Kuala Lumpur - Mr. Osada gave conflicting accounts of his role. He has said the payment was part of a 'contingency fund' that Itochu wanted him to set up to protect the Japanese consortium against foreign-exchange losses related to the construction contract. Once, when shown a copy of his statutory declaration and a copy of the agreement Sakyo signed with Itochu, Mr. Osada, citing faltering memory, said: 'I cannot say yes or no to your questions.' Later, Mr. Osada said that he did make the statutory declaration during a trip to Malaysia in May 1999, but insisted that the contents of the document were prepared by Tan Sri Chia. 'He [Tan Sri Chia] has been my friend for 45 years. He asked me to help him, so I signed the [statutory declaration].'

n. "Mr. Osada acknowledged that he is the majority shareholder of Sakyo with a 75% stake. He said the remainder is held by Malaysian businessman Datuk Shahril, who Mr. Osada said holds the shares on behalf of his father, Tan Sri Shamsuddin. The two men declined to respond to written questions about their role in Sakyo. However, close associates of the businessmen say that Datuk Shahril acknowledges his equity stake in Sakyo, but says that neither he nor his father were aware of Mr. Osada's business dealings with the Japanese consortium."

o. "In written responses to questions from this newspaper, Tan Sri Chia dismissed Mr. Osada's claims. 'The allegation that the statutory declaration made by Osada was influence by me is incorrect and untrue.' Tan Sri Chia added that he became aware of Sakyo's commission arrangement with the Itochu-led consortium only after reading Mr. Osada's statutory declaration."

p. "Tomoyuki Takada, a spokesman for Itochu, said in a telephone interview from Tokyo that Itochu had `no record' of the alleged agreement or of any fund transfer with Sakyo or Mr. Osada. He added that Mr. Ogino, the Itochu official who purportedly signed the agreement with Sakyo on behalf of Itochu, 'has no recollection, either written or verbal, with Mr. Osada or Sakyo.'"

q. "Likewise, according to people familiar with the Perwaja probe, NKK officials in Japan denied having any agreement with Mr. Osada, Sakyo or Frilsham during meetings with anticorruption investigators in 1996. NKK's Mr. Otani also denied to investigators that he signed the letter to Perwaja requesting the $30.6 billion payment to Frilsham in 1994. NKK officials in Tokyo, responding to questions from this newspaper, said that the company had never entered into any agreement with Mr. Osada or Sakyo. Mr. Otani could not be reached for comment."

8. The Article referred to and was understood to refer to the Plaintiffs. In their natural and ordinary meaning, the Words meant and were understood to mean as follows:

a. The 2nd Plaintiff was directly involved in perpetrating a large-scale fraud involving the unlawful misappropriation of money belonging to Perwaja Terengganu Sdn Bhd (Perwaja).

b. In so doing, the 2nd Plaintiff, in breach of the duties he owed to the 1st Plaintiff as its Managing Director, used the 1st Plaintiff as a vehicle to divert funds from their rightful owners.

c. The 2nd Plaintiff was involved in a criminal conspiracy and carried out a fraud and that the 2nd Plaintiff is therefore a criminal.

d. The 2nd Plaintiff personally benefited from the fraud and/or criminal misappropriation.

e. The 2nd Plaintiff had lied on various occasions to seek to avoid blame and/or to dishonestly seek to attribute blame to others.

f. The 1st Plaintiff allowed itself to be made us of and/or otherwise participate in the criminal misappropriation and/or fraud.

g. Having known of the criminal misappropriation and/or fraud, the 1st Plaintiffs, in bad faith and/or dishonestly, did not report the matter to the authorities or take any action against the 2nd Plaintiff.

h. The Plaintiffs are dishonest.

9. Further or in the alternative, the Words in their context bore, and were understood to bear, the meanings pleaded in paragraph 8 by way of innuendo

Particulars Of Innuendo

The Plaintiffs repeat the particulars set out in paragraph 8.

10. All these allegations are false. By reason of these matters, the Plaintiffs have been gravely injured in the reputation and standing and have been brought into public scandal, odium and contempt.

11. By a letter dated 27.8.001 and sent by fax and hand the Plaintiffs, through their solicitors demanded that the 1st Defendant immediately retract the Article and publish an apology in the next issue of The Asian Wall Street Journal, and compensate the Plaintiffs by way of damages.

[8] As the defendants are outside the jurisdictions, in accordance with the plaintiffs' *ex parte* order the notice of the writ of summons was served on the defendants in New York and Hong Kong, respectively, by the agents of the plaintiffs. In New York the notice of the writ was served on the 1st defendant by a firm of solicitors known as Messrs Watson, Farley & Williams; and in Hong Kong the same was served on the 2nd and 4th defendants by a firm of solicitors known as Messrs Kwok & Yih.

[9] Upon being served with the notice of the writ, the defendants made an *ex parte* interlocutory application before the senior assistant registrar for leave to enter conditional appearance. Under the Rules of the High Court 1980 ('the RHC'), entering a conditional memorandum of appearance is not as of right. A defendant must obtain prior leave of the High Court before filing such an appearance; and the practice is to make the application before the senior assistant registrar/deputy registrar of the High Court. The rule is provided by O. 12 r. 6 of the RHC. It stipulates:

6. Conditional appearance (O. 12 r. 6)

(1) A defendant to an action may with the leave of the Court enter a conditional appearance in Form 16 in the action.

A (2) A conditional appearance, except by a person sued as a partner of a firm in the name of that firm and served as a partner, is to be treated for all purposes as an unconditional appearance unless the Court otherwise orders or the defendant applies to the Court, within the time limited for the purpose, for an order under rule 7 and the Court makes an order thereunder.

[10] The procedure is also governed by Practice Note No. 4 of 1980. The defendants in the present case filed their application seeking leave by way of an *ex parte* summons in chambers. The *ex parte* summons in chambers is at encl. 13. The purposes for making the application for leave to enter a conditional appearance are mentioned in prayer 2 of the *ex parte* summons in chambers. The purposes are that (1) the defendants intend to apply to the Court (in the event that leave is granted) to set aside the notice of the writ summons; and/or (2) to set aside the service of the notice of the writ of summons. Paragraph 2 of the prayers of the defendants' *ex parte* summons in chambers at encl. 13 reads:

2. Defendan Pertama, Ke-2 dan Ke-4 dibenarkan lanjutan masa selama 30 hari dari tarikh Perintah ini selaras dengan Aturan 12 Kaedah 7 untuk memfailkan permohonan untuk mengenepikan Writ Saman dan/atau penyampaian Writ Saman tersebut.

[11] (It is important to bear in mind the dual purpose specified in the defendants' *ex parte* application for leave – but I will come to this later). Order 32 r. 1 and Form 62 of the RHC require the applicants/defendants to set out the grounds for the application for leave in the *ex parte* summons in chambers itself (and it may be amplified by the supporting affidavit, if any). This is clear. Order 32 r. 1 provides:

Mode of making application (O. 32 r. 1).

1. Except as provided by Order 25 rule 7, every application in Chambers must be made by summons in Form 62.

[12] And Form 62 stipulates:

The grounds of the application are (state the grounds):

[13] However, notwithstanding the above stipulations of O. 32 r. 1 and Form 62, the grounds for the application are set out only partially in the summons in chambers. They are set out merely as follows:

Alasan-alasan permohonan ini dinyatakan dalam Afidavit Jeffrey John yang diikrarkan pada 18-9-2003 dan difailkan di sini dan *inter alia* antara lain termasuk alasan bahawa Writ dan Pernyataan Tuntutan tidak mendedahkan apa-apa kausa tindakan terhadap Defendan Pertama, Ke-2 dan Ke-4.

[14] It is to be noted that although the summons in chambers states that there are several grounds for the *ex parte* application for leave, however, as a matter of fact, the summons in chambers gives only one ground: the failure to disclose the cause of action in the statement of claim. Thus the question: what about the other grounds? The summons in chambers merely states that the other grounds will be set out in the supporting affidavit. The supporting affidavit is at encl. 12 and is affirmed by a solicitor for the applicants/defendants. The affidavit states:

6. Pada perenggan 3 Pernyataan Tuntutan, Plaintif-Plaintif memplid bahawa Defendan Pertama adalah merupakan pemunya akhbar yang dikenali sebagai The Asian Wall Street Journal dan/atau adalah pemilik hakcipta dan/atau tanda niaga The Asian Wall Street Journal atau secara alternatif bahawa Defendan Pertama memberi kuasa kepada dan/atau kebenaran bagi penerbitan the Asian Wall Street Journal.

7. Pada perenggan 4 Pernyataan Tuntutan, Plaintif-Plaintif memplidkan bahawa Defendan Ke-2 adalah merupakan penerbit The Asian Wall Street Journal dan bahawa Defendan Ke-2 juga merupakan anak syarikat Asia kepada syarikat induk iaitu Defendan Pertama. Penelitian selanjutnya Pernyataan Tuntutan tidak mengemukakan apa-apa kausa tindakan terhadap Defendan Ke-2.

8. Pada perenggan 6 Penyataan Tuntutan, Plaintif-Plaintif pemplidkan bahawa Defendan Ke-4 merupakan pengarang The Asian Wall Street Journal. Penelitian selanjutnya Pernyataan Tuntutan tidak mengemukakan apa-apa kausa tindakan terhadap Defendan Ke-4.

9. Oleh yang demikian, adalah jelas bahawa Pernyataan Tuntutan Plaintif-Plaintif tidak mempunyai kausa tindakan yang boleh dikuatkuasakan terhadap Defendan-Defendan dalam tindakan ini dan prosiding-prosiding dimulakan oleh Plaintif-Plaintif terhadap Defendan-Defendan adalah remeh dan menyusahkan dan merupakan penyalahgunaan proses Mahkamah dan jelas tidak akan dipertahankan.

A 10. Oleh yang demikian, Pernyataan Tuntutan Plaintif-Plaintif tidak mendedahkan apa-apa kausa tindakan terhadap Defendan-Defendan yang dinamakan di dalam tindakan ini.

11. Justeru itu, ianya adalah hasrat Defendan-Defendan untuk membuat satu permohonan kepada Mahkamah yang mulia ini
B untuk mendapatkan satu perintah untuk membatalkan Writ dan PernyataanTuntutan terhadap Defendan-Defendan. Selaras dengan itu, Defendan-Defendan sepatutnya dan secara kebetulannya, pada masa ini, menyebabkan kehadiran bersyarat untuk dimasukkan berkenaan dengan Writ yang
C difailkan di sini.

[15] It is pertinent to observe that although the *ex parte* summons in chambers (encl. 13) says that the other grounds will be set out in the supporting affidavit, yet an examination of the above
D supporting affidavit will show that it does not disclose the other grounds. The supporting affidavit merely repeats the single ground that has already been mentioned in the *ex parte* summons in chambers (encl. 13), namely, the failure to disclose the cause of action in the statement of claim.

E **[16]** However, there is another defect in the application which is more serious. It will be noted that both the *ex parte* summons in chambers (encl. 13) and the supporting affidavit (encl. 12) merely assert that the plaintiffs have not disclosed any cause of action in the statement of claim: neither the summons in chambers nor the
F supporting affidavit explains the assertion. The defendants, either in the *ex parte* summons in chambers or in their supporting affidavit, do not explain why they say that the plaintiffs have failed to disclose any cause of action in their statement of claim.

G **[17]** In this regard, a pertinent question that needs to be asked is this: in the light of the plaintiffs' statement of claim, which has been served on the defendants, which clearly states that the action is a claim in tort for defamation, and which sets out particulars or details of the tort alleged, can the defendants in
H their *ex parte* summons in chambers (at encl. 13, seeking leave), or in their affidavit in support of the *ex parte* application, take a simplistic approach by merely asserting that there is no cause of action disclosed in the statement of claim, without elaborating or explaining the assertion? It is my opinion that, considering the
I nature and content of the statement of claim of the plaintiffs, the defendants' *ex parte* summons in chambers or affidavit in support

must explain, at least briefly (if not in detail), in what way can it be said that the statement of claim does not disclose any cause of action. For example (depending on the position that the defendants take), is it because the article, from the defendants' standpoint, is not defamatory in nature? Or, assuming the article is defamatory, is it because, from the defendants' standpoint, it is not defamatory of the plaintiffs? Or, assuming the article defames the plaintiffs, is it because the defendants are not the writer, or are not responsible for the writing, of the article? Or, is it because, assuming the article is defamatory of the plaintiffs, there is no publication of the article to a third party? In my opinion, if neither the *ex parte* summons in chambers (encl. 13) nor the affidavit in support explains, at least briefly, the assertion, then, the *ex parte* application is materially insufficient: it is a meaningless application. In other words, the *ex parte* application (encl. 13) for a leave application is fundamentally flawed; for the basis for the application is absent.

[18] If the *ex parte* summons in chambers (encl. 13) is fundamentally defective, then, legally, could the senior assistant registrar have granted the leave prayed for, as had happened in the present case? The answer must clearly be 'No'.

[19] Another reason why the *ex parte* application (encl. 13) of the defendants for leave to enter conditional appearance was fundamentally defective is that there has been a material non-disclosure. If neither the *ex parte* summons in chambers (encl. 13) nor the supporting affidavit of the defendants/applicants explains the assertion that there is no cause of action disclosed in the plaintiffs' statement of claim, when the defendants are under an obligation to so explain, considering the nature and content of the plaintiffs' statement of claim which has been served on them, then, there is a material non disclosure on the part of the defendants/ applicants. It is a cardinal principle of civil procedure that, when a party makes an application to Court, a full and frank disclosure is mandatory – all the more so in an *ex parte* application, where the application is made in the absence of the opposing party or the party that would be directly affected by the *ex parte* order sought for (in the event it is granted). In *Dormeuil Freres SA & Anor v. Nicolian International (textiles) Ltd* [1988] 3 All ER, Sir Nicholas Browne-Wilkinson VC said (at p. 199):

A It is a basic principle applicable to all *ex parte* applications that a party seeking *ex parte* relief must make full disclosure to the Court of all facts which are material to the exercise of the Court's discretion whether or not to grant the relief.

B **[20]** (See also *Balakerisnan Varathan & Anor v. Muniandy Varathan & Anor* [2005] 3 CLJ 327.)

[21] But there is yet another reason why the *ex parte* application (encl. 13) for leave is seriously defective. An important and relevant question to ask here is this: where the defendants' C complaint is merely that the statement of claim does not disclose a cause of action against them, can they apply for leave to file a conditional appearance under O. 12 r. 6 with a view to thereafter set aside or strike out the notice of the writ or the service of the notice of the writ under O. 12 r. 7? In my view, the answer must D be in the negative. To my mind, seeking leave to file a conditional appearance must only be for the following purposes as prescribed by O. 12 r. 7 of the RHC. The rule states:

7. Application to set aside writ, etc. (O. 12 r. 7)

E (1) A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within 14 days after entering appearance, apply to the Court for an order setting aside the writ or the service of the writ, or notice of the writ, on him, or F declaring that the writ or notice has been duly served on him or discharging any order giving leave to serve the notice on him out of jurisdiction.

(2) An application under this rule must be made by summons.

G **[22]** Legally it cannot be for any other purpose than those specified by the above provision. It is pertinent to observe that according to the above provision an *ex parte* application for leave under O. 12 r. 6 of the RHC to enter a conditional appearance is only for limited purposes; and they are as set out as follows:

H (1) to apply to the court for an order to set aside the writ; or

(2) to apply to the court for an order to set aside the service of the writ on him; or

I (3) to apply to the court for an order to set aside the notice of the writ; or

(4) to apply to the court for an order to set aside the service of the notice of the writ on him; or

(5) to apply to the court for an order declaring that the writ or notice of the writ has not been duly served on him; or

(6) to apply to the court for an order discharging any order giving leave to serve the notice on him out of jurisdiction.

[23] (In this regard please refer to *N. Caruppaiya v. MBf Property Services Sdn Bhd & Anor* [2000] 4 CLJ 116.) It is also important to observe that O. 12 r. 7 of the RHC refers only to the *ex parte* order granting leave to serve notice of the writ outside jurisdiction (such as the plaintiffs' *ex parte* order), to the writ or the notice of the writ. The provision clearly does not refer to the pleadings (ie, the statement of claim or the statement of defence).

[24] In my view, where a defendant merely takes the position that the statement of claim of the plaintiff does not disclose any reasonable cause of action, legally he cannot challenge or impugn the writ (or notice of the writ) or the service of the writ (or notice of the writ) by applying for leave to enter a conditional appearance to set aside the service of the writ (or the notice of the writ). He must not mix writ (or notice of the writ) with pleadings. The RHC has a specified provision for such a complaint (that the statement of claim discloses no reasonable cause of action) and he must invoke that particular provision. The appropriate course of action to be taken by him is to challenge or impugn the statement of claim: not the writ or the notice of the writ. And he can only do this by first filing an unconditional appearance and thereafter to make an application (by summons in chambers) under O. 18 r. 19(1)(a) of the RHC for the statement of claim to be struck out on the ground that it discloses no reasonable cause of action and for the action to be dismissed. Order 18 r. 19(1)(a) states:

19. Striking out pleadings and indorsement (O. 18 r. 19)

(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:

A (a) it discloses no reasonable cause of action or defence, as the case may be; or

…

and may order the action to be stayed or dismissed …

B **[25]** In this regard I am, however, aware of the contrary view of Jemuri Serjan CJ (Borneo) in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [2000] 2 CLJ 473 that once a defendant has filed an unconditional appearance he is C precluded from making an application under O. 18 r. 19. In the learned Chief Justice's (Borneo) very own words:

> It is too late for the defendants to invoke Order 18, rule 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke Order 18, rule D 19 but it is still open to them to have recourse to Order 33, rule 2 if they are so minded.

[26] But with greatest respect, I am unable to agree with the above *obiter dicta* and in *N. Caruppaiya* I have explained the reason E why I am unable to agree. In *N. Caruppaiya* I said (at p. 122-124):

> I shall now revert to *Alor Janggus*. In the light of the authorities and the express provision of O. 18 r. 19 itself remark of Jemuri Serjan CJ (Borneo) in that case to the effect:
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> F
>
> > It is too late for the defendants to invoke Order 18, rule 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke Order 18, rule 19 but it is still open to them to have recourse to Order 33, rule 2 if they are so minded.
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> G
>
> is, to my humble mind and with the greatest respect, rather unsettling. For such a statement implies that an O. 18 r. 19 application can only be made if the defendant has previously filed a conditional appearance (as opposed to an unconditional appearance). In all humility, I find great difficulty in understanding H this proposition. First and foremost, the learned Chief Justice (Borneo) did not explain why the Supreme Court held such a view – that the filing of an unconditional appearance precludes the defendant from making an O. 18 r. 19 application; nor were authorities cited to support the proposition. I find that there is I absolutely nothing either in the provision of O. 18 r. 19 or in the

provisions of O. 12 rr. 6 and 7 (the provisions dealing with conditional appearance) that stipulates or implies that such an application cannot be made once an unconditional appearance has been filed. On the contrary, such a view as expounded by the Supreme Court appears to run counter to the express provision of O. 18 r. 19 which clearly stipulates that the application may be made at any stage of the proceedings.

In the light of the implication of the Chief Justice's *dicta*, perhaps it might be some relevance at this juncture to understand the meaning and purpose of a conditional appearance. According to *Mallal's Supreme Court Practice* 2nd edn. By Tan Sri Chang Min Tat at p. 68:

> Conditional appearance, meaning of and effect of: The term "conditional appearance" means an appearance in qualified terms, reserving to the appearing defendant the right to apply to the court to set aside the writ or service thereof for an alleged informality or irregularity which renders either the writ or the service invalid.

As to O. 12 rr. 6 and 7, there provisions read:

6. Conditional appearance.

(1) A defendant to an action may with the leave of the Court enter a conditional appearance in Form 16 in the action.

(2) A conditional appearance, except by a person sued as a partner of a firm in the name of that firm and served as a partner, is to be treated for all purposes as an unconditional appearance unless the Court otherwise orders or the defendant applies to the Court, within the time limited for the purpose, for an order under rule 7 and the Court makes an order thereunder.

7. Application to set aside writ, etc.

(1) A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within 14 days after entering the appearance, apply to the court for an order setting aside the writ or service of the writ, or any notice of the writ, on him, or declaring that the writ or notice has not been duly served on him or discharging any order giving leave to serve the notice on him out of jurisdiction.

(2) An application under this rule must be made by summons.

It will be observed from these provisions that the filing of a conditional appearance is necessary, instead of an unconditional appearance, where the defendant intends to take any one of the following steps:

(a) to apply to the Court for an order to set aside the writ;

(b) to apply to the Court for an order to set aside the service of the writ;

(c) to apply to the Court for an order to set aside the notice of the writ;

(d) to apply to the Court for an order to set aside the service of the notice of the writ;

(e) to apply to the Court for an order declaring that the writ has not been duly served on the defendant;

(f) to apply to the Court for an order declaring that the notice of the writ has not been duly served on the defendant; or

(g) to apply to the Court for an order discharging any order giving leave to serve the notice on him out of jurisdiction.

It is pertinent to note from the above passage of *Mallal's Supreme Court Practice* and the aforesaid analysis of rr. 6 and 7 that the provisions do not encompass or envisage on O. 18 r. 19 application. The nature of an application under O. 12 r. 7 is not similar to that of an application under O. 18 r. 19. For one thing the former specifically refers to the setting aside of the writ while the latter specifically refers to striking out the statement of claim (or the statement of defence, as the case may). What is alleged in an O. 12 r. 7 application is the informality or irregularity of the writ or the service of the writ. But this is not the case in an O. 18 r. 19 application. An application under O. 18 r. 19 does not attack the writ; but is directed at the statement of claim (or the statement of defence, as the case may be). It is, therefore, clear that the filing of a conditional appearance has no bearing or relevance to the making of an application under O. 18 r. 19.

In any case, as conceded by Encik Selva Balan for the plaintiff, the above brief remark by Jemuri Serjan CJ (Borneo) in Alor Janggus is merely an *obiter dicta*. For, in that case, whether or not the respondents could file an O. 18 r. 19 application, was not the issue before the Supreme Court.

[27] What the above analysis means is that the defendants in the present case, legally, should not have made an application for leave to file a conditional appearance, since they are merely questioning the statement of claim, and not the writ or the notice of the writ, or the service of the notice of the writ (or the writ). Therefore, their *ex parte* application *vide* encl. 13 seeking leave to file a conditional appearance was misconceived. And since their application was misconceived, the senior assistant registrar, as a matter of law, ought not to have granted the order. The senior assistant registrar ought to have dismissed the application.

[28] To sum up, there are three reasons why the defendants' *ex parte* leave application (encl. 13) was fundamentally flawed and that the leave order should not have been granted by the senior assistant registrar; and they are as follows:

(a) the ground/reason for the *ex parte* application for leave to enter a conditional appearance as referred to either in the *ex parte* summons in chambers (encl. 13) or in the supporting affidavit, in the light of the nature and content of the plaintiffs' statement of claim, which clearly is a claim for libel setting out the particulars of the claim in detail, is materially deficient; and it follows, therefore, there has been serious non-compliance with O. 32 r. 1 and Form 62 of the RHC;

(b) the applicants/defendants have failed to make a full and frank disclosure in their *ex parte* application (encl. 13) for leave to enter a conditional appearance; and

(c) the said *ex parte* application (encl. 13) for leave was misconceived in that, since the defendants' complaint was merely that the statement of claim did not disclose any cause of action against them, they could not have applied for leave to file a conditional appearance under O. 12 r. 6 with the view to set aside or to strike out the notice of the writ or the service of the notice of the writ under O. 12 r. 7; the remedy lies in O. 18 r. 19 of the RHC.

[29] Now, if the defendants' *ex parte* application for leave (encl. 13) was misconceived or seriously flawed, and notwithstanding this misconception or serious defect, the senior assistant registrar, nevertheless, had granted the leave sought for, as had, unfortunately, happened in the present case, what then is the legal

A status of the 'conditional appearance' (encl. 14) entered by the defendants pursuant to the *ex parte* order obtained by them? Is this court a mere helpless and mute bystander and must recognize the 'conditional appearance' as valid? In my judgment, this court cannot in law recognize the 'conditional appearance' entered by
B the defendants as a valid conditional appearance. At best, this court can only regard the appearance as an unconditional appearance.

[30] Now, if legally this court must regard the 'conditional
C appearance' (encl. 14) merely as an unconditional appearance, what is the effect then on the defendants' application to strike out the plaintiffs' *ex parte* order (encl. 4) and the service of the notice of the writ *vide* encl. 18? In my judgment, the defendants' application *vide* encl. 18 must fail since in order to make an
D application under O. 12 r. 7, to discharge the plaintiffs' *ex parte* order granting leave to serve the notice of the writ out of jurisdiction pursuant to O. 11 r. 1(h) and to set aside the notice of the writ (or the service of the writ) the defendants must first have entered a valid conditional appearance and not an
E unconditional appearance.

[31] However, assuming that I am wrong in my ruling on the validity of the conditional appearance (in other words, assuming I were to accept the conditional appearance as valid), I am still of
F the view that the defendants' application *vide* encl. 18 to discharge the plaintiffs' *ex parte* order to serve the notice of the writ outside the jurisdiction and to set aside the notice of the writ must fail. I ruled for the following reasons:

[32] Firstly, the defendants when applying for leave *vide* encl. 13
G mentioned only two purposes, namely, to subsequently apply (should leave be granted) (i) to set aside the notice of the writ of summons and/or (ii) to set aside the service thereof on them. There was no mention then of the intention to apply to discharge the plaintiffs' *ex parte* order. Now, in my judgment, the defendants,
H having obtained leave to file a conditional appearance to set aside the notice of the writ and/or to set aside the service of the notice of the writ, cannot now, armed with the conditional appearance, apply also to set aside the plaintiffs' *ex parte* order at. In law, the defendants in their application *vide* encl. 18 must confine
I themselves only to the two purposes that they have specifically

mentioned when applying for leave *vide* encl. 13. To now apply to the court to ask for some extra, something that, before this, they had not thought off, would be an abuse of the process of court.

[33] I now come to my second reason. The defendants' summons in chambers at encl. 18 gives three grounds as to why they seek to set aside the plaintiffs' *ex parte* order (encl. 4) and the service of the notice of the writ. They are as follows (and I shall quote the defendants' summons in chambers at encl. 18):

(1) This Honourable Court does not have the jurisdiction over the plaintiffs' claim in respect of the subject matter within the meaning of Order 11 rule 1(h) to grant leave to issue the writ of summons out of jurisdiction.

(2) There is no cause of action.

(3) In the present case, there are no Civil Procedure Conventions in existence between Malaysia and Hong Kong or between Malaysia and the United States and service outside jurisdiction can only be effected pursuant to the provisions of Order 11 rule 6(2) of the Rules of High Court 1980 being through the Malaysian Consular Authority in the relevant Country.

[34] However, it is pertinent to recall that, as I have pointed out earlier, that the defendants when making the *ex parte* application (encl. 13) for leave to file a conditional appearance to challenge the notice of the writ and the service of the notice cited only one ground for the *ex parte* application, namely, the failure on the part of the plaintiffs to disclose a cause of action in the statement of claim. In the above summons in chambers (encl. 18) this particular ground is set out as ground (2). The defendants' *ex parte* application (encl. 13) for leave to file a conditional appearance is specifically for the purpose of their application *vide* encl. 18. Now, having obtained leave to enter a conditional appearance only on that single ground, I do not think it is now legally opened to the defendants to add two more grounds (namely, (i) on jurisdiction, as set out in (1) above; and (ii) on irregular services, as set out in (3) above) when making the application *vide* encl. 18. The defendants when making the application *vide* encl. 18 must confine themselves to that particular ground only (regardless how irrelevant the ground is in the context of O. 12 r. 7). To my mind, to add further grounds at the encl. 18 stage would be improper and an abuse of process. Now, if the court were to consider only this

particular ground, namely, the failure to disclose a reasonable cause of action in the statement of claim, then, the defendants application *vide* encl. 18, as I have earlier pointed out, was misconceived. It was misconceived because, as I have explained, where the defendants' complaint is that the statement of claim fails to disclose a cause of action, the appropriate provision to invoke is, not O. 12 r. 7, but O. 18 r. 19. I do not propose to repeat what has been deliberated earlier.

[35] In any case, can it validly be said that the plaintiffs' statement of claim fails to disclose any cause of action? In their written submission, the defendants contend that the plaintiffs' statement of claim fails to plead the publication of the alleged libel. Is this contention factually correct? With respect I do not think so. I have carefully examined the plaintiffs' statement of claim. In para. 3 of the statement of claim it is averred *inter alia*:

> ... The Asian Wall Street Journal enjoys a wide circulation in Malaysia.

[36] In para. 4 of the statement of claim it is averred, *inter alia*:

> ... The 2nd Defendant was and is the publishers of The Asian Wall Street Journal

[37] In para. 5 of the statement of claim it is averred, *inter alia*:

> The 3rd Defendant is the author of the article entitled "Perwaja Probe Focuses on a Payment" ("the Article") which was published in the 15.5.02 issue of The Asian Wall Street Journal ...

[38] In para. 7 of the statement of claim it is averred, *inter alia*:

> In the 15.5.02 issue of The Asian Wall Street Journal, the 3rd Defendant wrote and the 1st, 2nd and 4th Defendants published the Article which is defamatory of the Plaintiffs ...

[39] In conclusion, I hold that the defendants' appeal at encl. 27 must be dismissed with costs. My reasons can be summarised as follows:

(1) The defendants' conditional appearance at encl. 14 must as a matter of law be regarded merely as an unconditional appearance as the defendants' *ex parte* application (encl. 13) seeking leave to file a conditional appearance was misconceived

and fundamentally defective, which means the application for leave (encl. 13) to file a conditional appearance ought not to have been granted by the senior assistant registrar in the first place.

(2) The defendants' *ex parte* application for leave (encl. 13) was misconceived and fundamentally defective because of the following reasons:

(a) the ground/reason for the *ex parte* application for leave as referred to either in the *ex parte* summons in chambers (encl. 13) or in the supporting affidavit, is materially deficient; hence there was a serious non-compliance of O. 32 r. 1 and Form 62 of the RHC;

(b) the applicants/defendants have failed to make full and frank disclosure in their *ex parte* application (encl. 13) for leave; and

(c) the said *ex parte* application (encl. 13) for leave was misconceived because the intended next step contemplated by the defendants (should leave be granted) was to invoke O. 12 r. 7; but, considering the ground or reason for the *ex parte* application for leave, it was not appropriate for the defendants to have invoked O. 12 r. 7 of the RHC.

(3) As the court regards the defendants' appearance only as an unconditional appearance, therefore, legally, the defendants could not have applied to set aside the plaintiffs' *ex parte* order and the service of the notice of the writ on the defendants. In order to set aside the plaintiffs' *ex parte* order, the defendants must in the first place have entered a conditional appearance (as required by O. 12 r. 7).

(4) Even if the court were to regard the defendants' appearance as a valid conditional appearance, still, the defendants legally, could not have applied *vide* encl. 18 to set aside the plaintiffs' *ex parte* order. This is because when applying for leave to file a conditional appearance the defendants have clearly mentioned that the application for the leave (to file a conditional appearance) was for two purposes only, namely, (i) to set aside the notice of the writ of summons and (ii) to set aside the service of the notice of the writ.

(5) Even if the court were to regard the defendants' conditional appearance as valid, still, the defendants when making the application *vide* encl. 18, could not bring in any other grounds other than the sole ground mentioned in their *ex parte* application for leave to enter a conditional appearance, namely, that the plaintiffs' statement of claim do not disclose any cause of action.

(6) It was misconceived for the defendants to have made an application (encl. 18) under O. 12 r. 7 to set aside the plaintiffs' *ex parte* order and the service of the notice of the writ on them (the defendants). This is because, by reason of (5) above, the only complaint that could be brought by the defendants *vide* encl. 18 is that the plaintiffs' statement of claim fails to disclose any cause of action. If this then is the only complaint of the defendants, then, procedurally, the appropriate course of action that the defendants should have taken was to have entered an unconditional appearance and thereafter to invoke O. 18 r. 19(1)(a) of the RHC to apply to strike out the statement of claim and to have the plaintiffs' action dismissed.

(7) In any case, the defendants' contention that the plaintiffs' statement of claim does not disclose any cause of action is without merit as the court, upon examining the statement of claim, is satisfied that it does disclose a cause of action, namely the tort of libel.

[40] (The issues raised in this appeal are similar to those raised in my earlier judgment in the somewhat related case of *Tan Sri Shamsuddin Abdul Kadir & Anor v. Dow Jones & Company Inc & Ors* [2006] 2 CLJ 998. Hence, in this present judgment, I have followed the views that I have taken in that earlier judgment.)

[Appeal dismissed with costs]